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IN THE

Supreme Court of the United States

KEITH A. OWENS,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Commonwealth of Kentucky does not contest that the decision below deepened a widespread and entrenched conflict—one that has evenly split six federal courts of appeals, and divided the courts of at least a dozen states, *see* Pet. 6-13—over an important issue of federal constitutional law: whether the so-called automatic companion rule comports with the Fourth Amendment. Opp. 13. Indeed, the Commonwealth concedes that it has "no doubt that various jurisdictions have conflicting views of the 'automatic companion' rule." *Id.*

The Commonwealth nonetheless opposes certiorari, arguing primarily that this case is an inappropriate vehicle because of a purported "independent ground" upon which the judgment below "could have been based." Opp. 13-14. This contention is simply incorrect; there is no available alternative ground.

The Commonwealth's claimed alternative ground is that certain disputed testimony below, if credited, *could have* supported a finding that the evidence at issue was in plain view—*i.e.*, that it was not discovered as a result of the contested frisk of Petitioner. Opp. 14. But the state courts declined to resolve the factual dispute in the Commonwealth's favor, and the Kentucky Supreme Court addressed the case squarely on the basis that the evidence *was* discovered as a result of the frisk. This Court would have no basis for making its own findings on this disputed factual issue. Accordingly, the Commonwealth's claimed alternative ground for affirmance simply does not exist.

ARGUMENT

I. RESPONDENT'S OPPOSITION CONFIRMS THE EXISTENCE OF THE DEEP SPLIT IDENTIFIED IN THE PETITION.

The Commonwealth's opposition confirms the existence of an entrenched and widening conflict among the lower courts, both state and federal. Indeed, the Commonwealth expressly says it has "no doubt that various jurisdictions have conflicting views of the 'automatic companion' rule." Opp. 13.

On one side of this divide, the Fifth, Sixth, and Eight Circuits, and at least six state courts, have concluded that the Fourth Amendment and *Terry v. Ohio*, 392 U.S. 1 (1968), reject the automatic companion rule and require individualized reasonable suspicion. Pet. 7-10 (citing cases). These courts apply "traditional Fourth Amendment analysis," addressing the existence of individualized suspicion under "the 'totality of the circumstances.'" *United States v. Bell*, 762 F.2d 495, 499 (6th Cir. 1985).

In contrast, the Seventh and Ninth Circuits have endorsed the automatic companion rule, as have Kentucky and the courts of at least six other states. Pet. 10-13 (citing cases). The Fourth Circuit has also articulated and followed the rule, albeit without complete consistency. *See* Pet. 11-12.

In short, the split in the lower courts over the automatic companion rule is deep, acknowledged, and enduring, and the decision below undeniably exacerbates this important conflict.

II. RESPONDENT'S PURPORTED ALTERNATIVE GROUND IS NONEXISTENT.

The Commonwealth argues that certiorari is inappropriate because an "independent ground" exists "upon which the seizure of the baggie of drugs could have been based." Opp. 14. Specifically, the Commonwealth contends—based on the testimony of the officer who frisked Petitioner—that Petitioner voluntarily emptied his pockets, and in doing so, dropped the bag to the ground, where the officer could observe it in plain view. *Id.*

This is not a viable alternative ground, because it rests on a disputed question of fact that both the trial court and the Kentucky Supreme Court declined to resolve in the Commonwealth's favor. Indeed, the Kentucky Supreme Court specifically noted that the officer's account conflicted with Petitioner's "testi[mony] that the officer reached into his pockets," and further observed that the officer's testimony was itself "seemingly contradictor[y]." Pet. App. 3a.[1] Accordingly, the Kentucky Supreme Court began its opinion by saying it was "require[d]" to decide the question presented by the petition, Pet. App. 1a, and it resolved the question by "adopt[ing] the automatic companion rule," Pet. App. 9a.

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[1] In any event, even had the lower court chosen to credit the officer's testimony that Petitioner emptied his own pockets, that would hardly have established that Petitioner's action was not, for Fourth Amendment purposes, a result of the officer's initiation of the challenged frisk. *See* Pet. App. 3a (according to officer, Petitioner emptied his pockets either during or immediately after frisk).

In short, the Commonwealth invites this Court to reexamine conflicting testimony and make its own factual findings, Opp. 13-14—something this Court plainly cannot and will not do, let alone as a basis for finding an alternative ground. Indeed, this Court has steadfastly refused to affirm on grounds "not relied upon below" that were not "*clearly*" supported by the record. *Farmer v. Brennan*, 511 U.S. 825, 850 (1994) (emphasis added); *see also Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 551 n.3 (1990) (holding that "nothing in the record" permitted the Court to affirm on alternative ground pressed by respondent); *Boag v. MacDougall*, 454 U.S. 364, 365 (1982) (per curiam) (record did not provide "a sufficient ground for affirming" judgment on an alternative basis). Even the Commonwealth's own cases recognize that this Court may affirm on an alternative ground only where "the law *and the record permit*." *Thigpin v. Roberts*, 468 U.S. 27, 30 (1984) (emphasis added) (citing *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 166 n.8 (1977)). In short, the Commonwealth's proffered alternative ground is illusory.

It is worth noting, moreover, that in every other way the Commonwealth's opposition confirms that this case is an unusually *good* vehicle for resolving the issue in conflict. As the court below explained, this is a case in which all of the actions leading up to the frisk are unchallenged, Pet. App. 4a, thereby putting the permissibility of the frisk squarely in issue, Pet. App. 6a. The Commonwealth confirms this point, emphasizing not only that the *propriety* of the officer's actions leading up to the frisk are

unchallenged, Opp. 3-9, but also that the *facts* leading up to the frisk are undisputed, *id.* at 5.

III. RESPONDENT'S MERITS ARGUMENT IS BOTH IRRELEVANT AND UNSOUND.

The Commonwealth additionally contends that the decision below was correct. Opp. 9-13.

This contention, however, provides no basis for denying certiorari. If anything, Respondent's defense of the automatic companion rule—arguing that officers "must" be permitted to frisk passengers without individualized suspicion, "for the purpose of protecting [the officers'] safety," Opp. 10—only underscores the importance of the question presented.

In any event, the Commonwealth's argument is incorrect. "Nothing in *Terry* can be understood to allow a generalized 'cursory' search for weapons . . . ." *Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979). Indeed, this Court has made clear that a protective frisk must be based on a "reasonable belief or suspicion *directed at the person to be frisked*." *Id.* at 94 (emphasis added). It is only "[w]hen an officer is justified in believing that the *individual whose suspicious behavior he is investigating* . . . is armed and presently dangerous" that a protective frisk is constitutionally permissible. *Terry*, 392 U.S. at 24 (emphasis added).

Moreover, *Terry* made clear that a search premised on officer safety demands "specific and articulable facts" justifying what is "a severe, though brief, intrusion upon cherished personal security." *Id.*

at 21, 24-25. Indeed, "[t]his demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Id.* at 22 n.18. The automatic nature of the Kentucky Supreme Court's rule is flatly to the contrary: the frisk of the passenger is based on the generalization that the companions of arrested drivers always pose a safety threat to arresting officers.

Nor has the Commonwealth offered any reason for departing from this Court's usual context-dependent approach, under which it has "generally eschewed bright-line rules in the Fourth Amendment context," *Maryland v. Wilson*, 519 U.S. 408, 413 n.1 (1997), and has expressly noted the inappropriateness of an automatic rule in performing the *Terry* analysis, *see Michigan v. Long*, 463 U.S. 1032, 1049 n.14 (1983).

Finally, a key premise of the Kentucky Supreme Court's holding—that a *Terry* frisk may be considered a "minimal" intrusion, because "the passengers presumably have already been ordered to exit the vehicle," Pet. App. 11a—cannot be squared with *Terry*'s statement that a frisk is a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment." *Terry*, 392 U.S. at 17.

In short, the automatic companion rule is fundamentally inconsistent with this Court's precedents.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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